UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the matter of

K-VA-T FOOD STORES, INC. D/B/A FOOD CITY

and	Cases 9-CA-46125
	9-CA-46126
RETAIL, WHOLESALE & DEPARTMENT	9-CA-46127
STORE UNION, UFCW, CLC	9-CA-46152
	9-CA-46153

K-VA-T FOOD STORES, INC. D/B/A FOOD CITY'S RESPONSE TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S MOTION TO STRIKE A PORTION OF RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS

Respondent, K-VA-T Food Stores, Inc. d/b/a Food City ("Food City"), submits the following Response to Counsel for the Acting General Counsel's Motion to Strike a Portion of Respondent's Brief in Support of Exceptions. The General Counsel argues that three pages of the Respondent's brief should be stricken on the basis that those pages are outside of the 84 Exceptions Respondent timely filed to the ALJ's recommended decision. Contrary to the General Counsel's position, each argument made within Food City's Brief in Support of its Exceptions to the Decision of the Administrative Law Judge, are within the scope of its stated Exceptions, and no portion of its brief should therefore be stricken.

The ALJ, in his recommended decision, determined that Food City violated Sections 8(a)(1) and (a)(3) of the National Labor Relations Act ("the Act") in the discipline and/or termination of three former employees. In response, Food City timely filed it Exceptions to the Decision of the Administrative Law Judge, which included 84 Exceptions with references to the ALJ's decision and line number, detailed explanations in support of each Exception, and a 50-

page brief in support of the Exceptions. Every conclusion of law by the ALJ supporting his finding of the violations, save one, was excepted to.

Section 102.46(c) of the Board's Rules and Regulations provides that, "Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions..." (emphasis added). Here, Food City filed Exceptions to every portion of the ALJ's Findings of Fact, Discussion and Conclusions of Law. As stated above, the ALJ determined that Food City violated Sections 8(a)(1) and 8(a)(3) of the Act and that, as a result, Glenda Burton, Martha Smith and Ruth Ann Kirk (the "alleged discriminatees") were entitled to the remedy of reinstatement and other remedies beyond that which they obtained through private settlement agreements with Food City. Should the Board find merit in Food City's Exceptions and determine that no violation of the Act occurred, the natural conclusion from such a determination would be that the alleged discriminatees would not be entitled to the remedies granted to them by the ALJ beyond what they have already received. Consequently, each argument set forth in Food City's Brief in Support of its Exception is "within the scope" of its enumerated Exceptions.

Further, the cases cited by the General Counsel in support of its position are inapposite to the issue in this matter. In each of the two cases mentioned, the employer made an entirely new argument not within the scope in its Exceptions and that was based upon the specific findings of fact and conclusions of law made by the ALJ. See, e.g., Millmen and Industrial Carpenters Union Local 1618, 356 NLRB No. 76, slip op. p. 2 (2001) (employer facing charges for failure to provide information to the union in collective bargaining did not except to the lack of relevancy of the requested information, but argued that it was not relevant in its brief); see also Engineered Comfort Systems, 346 NLRB 661 (2006) (employer excepted to ALJ's credibility determination as to whether or not a statement was made, but argued in its brief that the statement itself was not

legally actionable). Essentially, those employers were adding new arguments to challenge the entire basis of the ALJ's decision, and were not remedy-driven.

By contrast, the portion of the brief at issue here goes to a remedy which would be appropriate if and only if the Board upholds the ALJ's decision that a violation of the Act occurred. Food City has excepted to *all* of the findings of fact and conclusions of law made by the ALJ, the acceptance of which would naturally preclude any remedy afforded to the alleged discriminatees. The arguments set forth in its brief do not add new arguments, they simply expound upon and further develop the rationale behind Food City's Exceptions in that the remedies afforded as a result of the ALJ's erroneous findings would otherwise be unavailable to the alleged discriminatees had the ALJ properly considered the evidence and applied the law.

Based on the circumstances here, striking a portion of Food City's brief would be unjust. Because all of Food City's arguments in its brief are "within the scope" of its stated Exceptions, no portion of its brief should be stricken. Food City respectfully requests that the General Counsel's motion should be denied.

Respectfully submitted,

K-VA-T FOOD STORES, INC. D/B/A FOOD CITY By Counsel

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d/b/a Food City

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CERTIFICATE OF SERVICE

I, Ashley C. Pack, counsel for K-VA-T Food Stores, Inc. d/b/a Food City, do hereby certify that the foregoing K-VA-T Food Stores, Inc. d/b/a Food City's Response To Counsel For the Acting General Counsel's Motion To Strike A Portion Of Respondent's Brief In Support Of Exceptions was filed via the National Labor Relations Board's electronic filing system on the following this 21st day of September, 2011:

Lester A. Heltzer, Executive Secretary Board's Office of the Executive Secretary 1099 14th Street N.W. Washington, DC 20570

and that a true and exact copy of the same was served on the following via electronic mail this the 21st day of September, 2011:

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